No. 97.
Brief of Hamilton & Colbert.
For D. C.
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Supreme Court of the United States,

OCTOBER TERM, 1897.

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THOMAS W. STEWART, ADMINISTRATOR OF THE ESTATE OF JOHN ANDREW CASEY, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming a judgment rendered in the supreme court of the District of Columbia sustaining the defendant's demurrer to the plaintiff's declaration filed in said suit.

It appears from the record that John Andrew Casey, late of the District of Columbia, was employed as a postal clerk in the service of the United States on the line of the defendant company, and on October 6, 1888, was killed in a collision on the defendant's road in the State of Maryland,

between two stations known as Dickerson and Tuscarora, through the negligence, as it is alleged, of the defendant's agents. He left a widow, but no parent or child. Letters of administration on the estate of the deceased were taken out in the District of Columbia, and the administrator, Thomas W. Stewart, brought this suit, for the use of the widow, to recover damages for the death of John Andrew Casey, alleged to have been caused by the negligence of the defendant. The declaration in this suit is in the name of the administrator and contains two counts, both alleging the death to have occurred in the State of Maryland. The first count seems to be based upon the act of Congress affecting this subject and relating to the District of Columbia, while the second count is expressly based upon the Maryland act, which act is in the second count set forth *in extenso*. A demurrer was filed to the declaration based on these grounds, namely:

1. There can be no recovery in the District of Columbia for the death of the plaintiff's intestate in the State of Maryland by the alleged wrongful act of the defendant.

2. The provisions of the Maryland act cannot be enforced in the District of Columbia.

This demurrer was sustained by the trial court, and the judgment of that court affirmed by the Court of Appeals.

BRIEF OF ARGUMENT.

A declaration in a suit which seeks by the use of separate counts to recover statutory damages at once under a home and a foreign statute, which statutes, especially as to the form of remedy provided, are materially variant, is as novel as it is faulty, and it must appear that there is no error in the judgment of the court below in sustaining the demurrer because—

I.

There can be no recovery in the District of Columbia for the death of the plaintiff's intestate in the State of Maryland by the alleged wrongful act of the defendant.

At common law such actions, of course, could not be maintained, and the rule of the common law can only be departed from according to the scope and provisions of the statutes of the several States and in the District of Columbia of the act of Congress authorizing such suits. Turning to the act of Congress relating to the District of Columbia, entitled "An act to authorize suits for damages when death results from the wrongful act or neglect of any person or corporation in the District of Columbia" (23 Statutes at Large, page 301), we find that the wrongful or negligent act or injury causing the death must have occurred *within the limits of the District of Columbia.*

From the declaration in this suit it appears that the injury occurred at some place in the State of Maryland, and it would therefore seem to follow unquestionably that the demurrer must be sustained to the declaration, in so far as it is based upon the laws of the District of Columbia.

II.

Again, *the provisions of the Maryland act cannot be enforced in the District of Columbia.*

The only ground upon which this action could be maintained in the District of Columbia, by virtue of the provisions of the Maryland code, is that of comity; but to bring this rule of comity into application would require the statute of Maryland and the statute of the District of Columbia to be in all respects substantially similar. Comparing the acts of Maryland and of the District of Columbia, we find hat the laws of the two places are essentially dissimilar,

especially in the form of the remedy provided. Section 2 of the Maryland act provides "that every such action shall be for the benefit of the wife, husband, parent, or child of the person whose death shall have been so caused, and shall be brought in the *name of the State of Maryland for the use of the person entitled to damages*, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, *shall be divided amongst the above-named parties in such shares as the jury by their verdict shall find and direct.*" Now, the act of Congress relating to the District of Columbia provides that "every such action shall be brought by and in the name of the personal representative of the deceased person," and that the damages recovered "shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the District of Columbia." Under the law of Maryland in this case damages, if recovered, would go to the wife. Under our statute, if it had occurred in the District of Columbia, such recovery would have been equally divided between the wife and any collateral next of kin.

In discussing this question the Court of Appeals (Rec., p. 8) says:

"It will thus be seen that the equitable plaintiff is seeking to recover damages given by a law of Maryland for an injury suffered in that State by means of a remedy provided by the laws of this District for an injury suffered here. Can this be done?

"The case of Dennick *vs.* Railway Company, 103 U. S., 11, is, of course, the leading authority for us on this subject of recovery for injuries causing death. That was an action by the administratrix of a party killed through negligence in New Jersey, who had taken out letters and brought her action in New York. The laws of New York and New Jer-

sey were similar, and gave the right of action to the same person, the personal representative. When the court decided to apply the rule of State comity to torts, which had theretofore only applied to contracts—*i. e.*, when they held that what was made an actionable tort in one State must be so treated everywhere else—there was no difficulty in holding that the person to whom the right of action was given in both States might sue in either.

"But the present case presents quite a different question, the action being brought by a person to whom the statute under which relief is sought does not give a right of action.

"The case of Dennick *vs.* Railway Company, like all others, recognizes the right to damages for an injury causing death as a novelty in the law—as a right which did not exist at common law, but which is entirely statutory; and here the plaintiff is confronted with the rule that, in such case, the remedy provided by the statute is the only one that can be resorted to."

And the cases of Pollard *vs.* Bailey, 20 Wall., 520, and of the Fourth National Bank of New York *vs.* Francklyn, 120 U. S., 747, are cited and applied in support of the position of the Court of Appeals (Rec., p. 10). "These cases seem to fit the present case exactly. If the Legislature of Maryland had simply declared generally that a person causing the death of another wrongfully or negligently should be liable in damages to the family of the deceased, they might in their own names have instituted suit. But, since a particular form of action is prescribed, they are confined to that."

And further on (Record, p. 10), the Court of Appeals says:

"Again, it must be very clear that this action could not have been maintained in the State of Maryland. To hold that it can be maintained here would be to subject the defendant to different kinds of suits in every State in which they may happen to be instituted, which could not have been intended.

"There may be the best of reasons for confining the parties intended to be benefited to the very form of relief provided in the statute. The policy of the Maryland law was to confine that relief to the immediate family of the deceased, viz.,

the wife, parent, and child of a man; but in some of the States it is extended to collaterals, and in others it enures to the estate generally (Tiffany's Death by Wrongful Act, sec. 25, 81). While it is true that an administrator suing in another State to enforce rights given by the statute of Maryland might, as the supreme court say in Dennick *vs.* Railway Co., be required by the court to apply the proceeds according to the Maryland law, yet, on the other hand, it is also true that the administrator is subject to the law of his State, and by that law he might not be allowed to make such application, but might be required to administer them for the benefit of creditors and next of kin generally, which would be entirely contrary to the policy and intent of the Maryland law, which does not treat the damages recovered as the subject of administration.

"We are therefore of opinion that the present suit by the administrator to claim the damages allowed by the Code of Maryland for the injury alleged in the declaration cannot be maintained, and that an action therefor can only be maintained under that code by and in the name of the State of Maryland.

"But we further think that even this form of action was not intended by the Maryland Code to be authorized except in the courts of that State. It is incredible that the State would consent or intend to be a suitor in the courts of another jurisdiction in a matter not of public interest, especially where it would or might be for the use of a citizen of another State against her own citizens; and that is exactly this case, the defendant being incorporated by and being for certain purposes a citizen of Maryland.

"Again, the statute of Maryland gives the action for the use of the wife, parent, and child, not apportioning the damages among them, but leaving that to be done by the trial jury, and it is hardly to be supposed that the State of Maryland would attempt to impose a duty of that sort upon juries of other States or any others than the juries subject to her legislative control.

"If such be the intent of the Maryland statute it would seem that no relief can be had under it in any other State."

Bruce, adm'r, *vs.* Cincinnati R. R. Co., 83 Ky., 174.

The Court of Appeals (Rec., p. 11) says:

"The final objection to the maintenance of the present action is one foreshadowed in what has already been said, viz., that, in the language of Story's Conflict of Laws, sec. 556: 'It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or, as the civilians uniformly express it, according to the *lex fori;*' and that the proceeding directed by the Maryland Code is entirely foreign to the forensic law of this District, and could not be prescribed by the State of Maryland for the government of our courts.

"One of the very questions to be determined by the *lex fori* is, Who is to sue for a wrong? For example, as between assignor and assignee of a chose in action, that is to be determined by this law (Story's Conflict of Laws, sec. 566); and in common-law courts this would be held in one way, while in courts governed by the Roman civil law it might be different. (See also a discussion of this subject in Glenn *vs.* Busey, 5 Mackey, 243.)

"The Maryland Code recognizes a death wrongfully caused as an injury to the wife, child, and parent of the decedent. In this District, while we recognize actions *ex contractu* as properly brought by one for the use of another, an action *ex delicto* of that kind is unknown. By the common law, which is our *lex fori*, an action of that kind must be brought by the party injured, an exception being made only by our statute in relation to deaths wrongfully caused in this District, in which case, as if the cause of action survived, the personal representative may sue and distribute any damages recovered as the rest of the personal estate of the decedent, according to our statute of distributions. We are compelled by the authority of Dennick *vs.* Railway Co. to recognize the right to indemnity of the family of a decedent whose death was caused in Maryland by negligence, but we are not obliged to recognize the State of Maryland as a proper suitor in our courts in their behalf.

"Again, the statute of Maryland gives the right to damages to the wife, parent, and child of a male victim; but, instead of designating the proportions in which they shall be entitled, leaves that to be decided by a jury. Suppose

the statute had in terms provided that in any suit brought in another State for a death wrongfully caused in Maryland the damages should be divided among the parties in such manner as should be decided by the court trying the suit, could it be maintained that the court of a sister State could derive any authority or jurisdiction from the act of Maryland so to decide; and could it, with even as much show of reason, be held that the statute in question could impose a duty upon the court so to decide; and, if not the court, could the jury of another State be charged with any such duty?

"These questions must be answered in the negative. If the legislature of Maryland, instead of defining rights, leaves them to be decided elsewhere, it may speak with authority as to the tribunals of their own State, but they can neither confer authority nor impose a duty on those of another jurisdiction. If so, their statute under consideration cannot be executed in this District.

"The equitable plaintiff, then, would seem to be in this predicament, to wit, that she cannot sue, claiming under the law of Maryland, except by and in the name of that State, and that she cannot bring such a suit in this District because, first, the statute does not authorize such a suit, and, next, because it could not authorize such a suit if the legislature of Maryland had so intended."

In Ash, administratrix, *vs.* The Baltimore and Ohio Railroad Company, 72 Md., 147, where a Maryland administrator brought suit in that State on a statute of West Virginia for death occurring in West Virginia, the Court of Appeals, through Chief Justice Alvey, pointing out the dissimilarity of provisions existing between the statutes of the two States, held that the action could not be maintained. On page 148 he says:

"There is certainly no comity that requires one State to apply and administer the statute law of another in a case such as the present."

And in this same case it was decided that the Maryland statute, by reason of its peculiar and local provisions, had no extraterritorial force and could not be applied and enforced in other jurisdictions.

It is respectfully submitted that the judgment of the court below must be affirmed.

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